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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 583.

WHEATON BRASS WORKS, a corporation of the State of New Jersey,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND SUPPLEMENTAL APPENDIX.

ROY C. COLLINS,
Counsel for Petitioner,
24 Commerce Street,
Newark 2, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

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SOUTHERN PACIFIC COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Wheaton Brass Works, the petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in the above-entitled case on December 4, 1950.

Opinions Below.

The memorandum opinion of the Essex County (New Jersey) District Court (R. 6) is unreported. The opinion of the Supreme Court of New Jersey (R. 11) is reported in 5 N. J. Reports 594.

Jurisdiction.

The judgment of the Supreme Court of New Jersey was entered on December 4, 1950 (R. 20). Jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3), (June 25, 1948, c. 646, 62 Stat. 929) and 28 U. S. C., Section 2101(c), (June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, Sec. 106, 63 Stat. 104). Respondent sued the petitioner to recover the amount of an undercharge for freight ($738.37) on a shipment of goods from California to New Jersey (R. 2, 3). The undercharge resulted from a misdescription of the goods by the shipper (R. 3). The amount sued for represented the difference between the amount of freight charged, and paid by, the shipper pursuant to the tariffs applicable to the shipment as described by the shipper and on file with the Interstate Commerce Commission, and the amount properly payable under the filed tariffs applicable to the actual goods shipped (R. 3). Under the applicable New Jersey statutes no answering pleading is required to be filed by the defendant (See Appendix "C" *infra*, page 21), and none was filed here. The petitioner appeared and defended on the ground that it did not create and had no knowledge of the undercharge; that it had not contracted with the shipper or the respondent-carrier to pay shipping charges; and that the shipper who had contracted to pay such charges was in existence and solvent (R. 3-5). The case was tried, without a jury, on a stipulation of facts (R. 2).

The trial court entered judgment for the defendant-petitioner on the authority of this Court's decision in *Louisville & Nashville Railroad Company* v. *Central Iron*

& Coal Company (1924), 265 U. S. 59, 68 L. Ed. 900 (R. 6). The respondent appealed to the Appellate Division of the Superior Court of New Jersey (R. 7), on the ground that a consignee who accepts liability of an interstate shipment becomes liable as a matter of law, for the full amount of the filed and posted tariff charges, the liability resting upon public policy as expressed in the Interstate Commerce Act (49 U. S. C., Section 6(7)), which forbids preferences "in any manner or by any device." (See Appendix "D", *infra*, page 22 at page 26). While pending in the Appellate Division of the Superior Court, the case was certified to the Supreme Court of New Jersey on the latter's motion (R. 1). The Supreme Court of New Jersey decided that by virtue of the Statute referred to, a consignee who accepts delivery of an interstate shipment becomes liable, as a matter of law, for shipping charges (R. 11-19) irrespective of whether or not the consignee has contracted, expressly or impliedly, with the carrier to pay such charges (R. 11-19), and reversed the judgment of the Essex County (New Jersey) District Court (R. 20). The Supreme Court of New Jersey is the highest court of the State of New Jersey in which a decision on this case could be had (See Appendix B, *infra*, page 21).

Question Presented.

Whether a consignee who accepts delivery of an interstate shipment, but who has not contracted, expressly or impliedly, with either the shipper or the carrier to pay freight charges, and has so informed the carrier prior to delivery, is liable nevertheless for shipping charges for which the shipper contracted and is able to pay, by virtue

of the provisions of Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)), (Act February 4, 1887, c. 104, Sec. 6, par. 4, 24 Stat. 381, as amended Act March 2, 1889, c. 382, Sec. 1, pars. 4, 7, 25 Stat. 856, 857, Act June 29, 1906, c. 3591, Sec. 2, Sec. 6, par. 6, 34 Stat. 587, Act February 28, 1920, c. 91, Sec. 411, Sec. 6, par. 6, 41 Stat. 483) where by the common law of the State in which delivery occurred (New Jersey) a consignee is not liable for freight charges in the absence of an express or implied contract with the carrier to pay the same.

Statute Involved.

The pertinent statutory provisions are set forth in Appendix A *infra,* page 20.

Statement.

On May 6, 1947 the petitioner entered into a contract with one Bernard Pipe Supply of Los Angeles, California, for the purchase of 291 boxes of loading assemblies, by the terms of which contract the seller was to prepay the shipping charges (R. 3, pars. 5, 6). On or about June 1, 1947 the Officer in Charge, Construction Battalion Center, Port Hueneme, California, as agent of the seller, delivered the said assemblies to the respondent's agent at Oxnard, California, for shipment to the petitioner at Newark, New Jersey (R. 3, par. 1). The assemblies were described in the bill of lading as "291 BXS Pipe Fittings, NOIBN, I/S" (R. 3, par. 1). The abbreviation "I/S" is accepted among carriers as meaning "Iron and Steel." (R. 3, par. 2). The shipment actually consisted of iron and steel pipe with

fittings and brass valves (R. 3, pars. 3, 4). The shipper's agent prepaid the respondent's charges of $1,082.42 on the basis of tariffs and schedules of the Interstate Commerce Commission applicable to shipments of iron and steel (R. 3, par. 1). Prior to the arrival of the goods in Newark, New Jersey petitioner received from the seller in California, an invoice for the price of the goods, which indicated that the shipping charges had been prepaid (R. 4, par. 7). Enclosed with the invoice was a uniform straight bill of lading indicating that the freight charges were to be collected (R. 4, par. 8). Shortly thereafter, petitioner received an arrival notice from the Pennsylvania Railroad Co., the terminal carrier, indicating that the goods had arrived at its freight station in Newark and could be picked up there. Said arrival notice also indicated that ffeight charges had been prepaid (R. 4, par. 9).

The petitioner, although it knew that the shipment consisted partly of brass (R. 3, par. 3), did not know that said shipment had been misdescribed for rate classification purposes or otherwise (R. 3, par. 3), nor did it know the meaning of the initials "I/S" or that the bill of lading incorrectly described the shipment for rate classification purposes (R. 3, par 3), nor did it know from the bill of lading or otherwise, what freight charges, if any, had been paid by the shipper (R. 5, par. 18). However, in view of the conflicting statements on the invoice and arrival notice as compared with the bill of lading, the petitioner communicated with the terminal carrier, the Pennsylvania Railroad Co., before accepting delivery of the goods or paying the shipper for the same, and inquired concerning shipping charges, explaining that by its contract with the shipper the latter

was to pay such charges; that the shipper's invoice indicated shipping charges had been paid in full; that the Pennsylvania Railroad Co.'s arrival notice also indicated that shipping charges had been paid in full, but that the bill of lading issued by respondent indicated that shipping charges were to be collected; that by reason of its contract with the shipper, *it was unwilling to accept delivery of the goods* or pay the shipper for the same until it knew whether there were any shipping charges payable (R. 4, par. 10). The Pennsylvania Railroad Co. informed petitioner that shipping charges had been prepaid in full (R. 4, par. 11). In reliance thereon petitioner accepted delivery of the goods and paid the shipper the full contract price therefor (R. 4, par. 12).

Approximately eighteen months later, a representative of the Pennsylvania Railroad Co. called on petitioner and inquired concerning the nature of the shipment, and for a description of the property shipped (R. 4, par. 13). Petitioner described said shipment to said representative who thereupon informed petitioner that the goods had been improperly classified by the shipper, as a result of which there were additional freight charges due and payable (R. 5, par. 14). The petitioner informed said representative that by the terms of its contract with the shipper it was the shipper and not petitioner who was liable for freight charges, exhibiting its contract with the shipper to said representative, in substantiation of its contention, and informed said representative that any unpaid freight charges would have to be collected from the shipper (R. 5, par 15). The respondent has made no effort to collect said shipping charges from the shipper, although the latter is still in business and solvent (R. 5, pars. 20, 21). Instead, it instituted the present

suit in the Essex County (New Jersey) District Court on June 16, 1949, against the petitioner to collect said unpaid charges in the amount of $738.37 (R. 2, pars. 1, 2). The case was tried, without a jury, on a stipulation of facts (R. 2, pars. 1, 3). The respondent contended that the petitioner, having accepted the shipment, was liable, as a matter of law, for the shipping charges by virtue of the provisions of 49 U. S. C., Section 6(7) and the decisions of this Court in the cases of *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Alvin J. Fink* (1919), 250 U. S. 577, 63 L. Ed. 1151, and *Louisville & Nashville Railroad Company* v. *United States* (1925), 267 U. S. 395, 69 L. Ed. 678 (R. 6).

Petitioner contended that it had not contracted with the carrier or the shipper to pay shipping charges; that the shipper had contracted for such charges and was able to pay and that, therefore, on the authority of the reasoning of this Court in the case of *Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company, (supra),* it was not liable to the carrier for the balance of freight charges demanded (R. 6).

The trial court found that petitioner had not, in fact, contracted with the carrier to pay shipping charges, and on the authority of the *Central Iron* case, *(supra),* entered judgment for the petitioner on March 10, 1950 (R. 6).

The respondent appealed to the Appellate Division of the Superior Court of New Jersey (R. 7) on the ground that a consignee who accepts delivery of an interstate shipment becomes liable, as a matter of law, for the full amount of the filed and posted tariffs, the liability resting

upon public policy as expressed in the Interstate Commerce Act (49 U. S. C., Section 6(7)) which forbids preferences "in any manner or by any device" (See Appendix "D", *infra*, page 22 at page 26). While pending in the Appellate Division of the Superior Court the case was certified to the Supreme Court of New Jersey (the court below) on the latter's motion (R. 1). The court below held that the only issue involved was one of law (R. 11); that petitioner's liability for the freight charges became fixed as a matter of law upon acceptance of the shipment on the authority of 49 U. S. C., Section 6(7) and this Court's decision in the case of *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Alvin J. Fink, (supra)* (R. 11-19), and by a divided court (R. 19) on December 4, 1950 reversed the judgment of the Essex County (New Jersey) District Court (R. 20).

Specification of Errors to Be Urged.

The Supreme Court of New Jersey erred:

1. In holding that a consignee of an interstate shipment who has not contracted with the carrier or the consignor to pay shipping charges where such contractual committment is the basis of common law liability in the state where the transaction occurred, but who nevertheless accepts the shipment, is liable as a matter of law, for shipping charges for which the shipper contracted and is able to pay, by virtue of the provisions of Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)).

2. In not holding that Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)) imposes no lia-

bility on a consignee for shipping charges for which the shipper contracted and is able to pay, unless the consignee has expressly or impliedly contracted with the carrier to pay the same, where such contractual committment is the basis of the common law liability of a consignee for such charges in the state where delivery occurred.

3. In holding that Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)) completely abrogated the rule of New Jersey common law that a consignee is not liable to the carrier for shipping charges for which the shipper contracted and is able to pay, in the absence of an express or implied contract with the carrier on the part of the consignee, to pay the same.

4. In not holding that Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)) merely modified the rule of New Jersey common law that a consignee is not liable to the carrier for shipping charges for which the shipper contracted and is able to pay, in the absence of an express or implied contract with the carrier on the part of the consignee to pay the same, to the extent that:

a. If any such contract be entered into the parties are conclusively presumed to have contracted for the payment of the full legal rate, *i. e.*, those filed and published by the Interstate Commerce Commission under the statute referred to.

b. Once contractual liability of a consignee to a carrier to pay freight charges is created, no act or omission of the carrier (except the running of the Statute of Limitations) can estop or preclude it from enforcing payment of the full amount.

c. Neither by the contract nor by any act or omission of the carrier at or after the creation of the same, can the carrier be estopped or precluded (except by the running of the Statute of Limitations) from enforcing payment of the full amount by a consignee who has expressly or impliedly contracted to pay the same.

5. In reversing the judgment of the Essex County (New Jersey) District Court.

Reasons for Granting the Writ.

Preliminary Statement.

Since the essence of the question presented by the decision of the court below and this application for a writ of certiorari to the Supreme Court of New Jersey to review the same is the extent to which Section 6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)) has modified or abrogated the common law, in the interests of brevity and the avoidance of repetition hereafter, petitioner here states what it believes the New Jersey common law to be; *viz.*, (a) that the mere existence of the relation of carrier and consignee is not enough to establish a liability of the latter to pay freight charges; there must be an agreement by the consignee, express or implied, in order to create such a liability; (b) where a common carrier, upon delivery of goods at destination, waives its right of lien for unpaid freight charges and permits the consignee to remove the goods, the mere acceptance and removal of the goods by the consignee with the knowledge that the carrier is thereby giving up its carrier's right of lien, does not create an obliga-

tion on the part of the consignee to pay freight charges; (c) even where, under the circumstances set forth in (b) the consignee has knowledge (there was no such knowledge on the part of the consignee here) that freight charges to a certain amount remain unpaid, mere acceptance and removal of the goods by the consignee does not, standing alone, create an absolute liability on the part of the consignee for freight charges. Acceptance and delivery by the consignee under such circumstances, unexplained and uncontradicted, is sufficient evidence from which a court may imply a promise to pay freight charges, but it is still open to the consignee to offer other evidence explaining or contradicting the implications otherwise to be drawn from its acceptance of the goods; and it is open for the court and jury, notwithstanding the acceptance of the goods by the consignee and the concurrent waiving of its right of lien by the carrier, to find that the consignee, by such conduct did not impliedly promise to pay freight charges.(1)

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1. The decision of the court below in the instant case establishes the rule that a consignee who accepts delivery of a shipment in interstate commerce is liable, as a matter of law, to the carrier by virtue of the provisions of Section

(1) See *Central Railroad Company of N. J.* v. *MacCartney* (N. J. Sup. Ct., 1902), 68 N. J. L. 165, 52 Atl. R. 575 and *Pennsylvania Railroad Co.* v. *Townsend* (E. & A., 1917), 90 N. J. L. 75, 100 Atl. R. 855. It is believed that the common law of New Jersey is in accord with the common law generally on this point. See *Williston on Contracts* (1936 Ed.), Vol. 1, Secs. 90, 90B and especially Sec. 90BB. See also *American Law Institute, Restatement of the Law of Contracts*, Sec. 70.

N. B. To avoid possible confusion with the statements under the caption "Jurisdiction" above, it should be noted that the Supreme Court which decided the *MacCartney* case is not the same court whose judgment is sought here to be reviewed. The former was abolished by the New Jersey Constitution of 1947. So also, by the Constitution of 1947, New Jersey's former court of last resort (Court of Errors and Appeals) was superseded by the Supreme Court of New Jersey (the court below).

6(7) of the Interstate Commerce Act (49 U. S. C., Section 6(7)) for shipping charges for which the shipper contracted and is able to pay (R. 11-19), it being immaterial to such liability whether or not the consignee has expressly or impliedly contracted to pay all or any part of the shipping charges (R. 16), where by state law such contractual undertaking is a condition precedent to the liability of an accepting consignee (R. 17-18). This Court has never passed upon the liability of a non-contracting consignee under said Statute for such charges.(2) Clearly, the question presented is of importance to the public and in the administration of the federal laws relating to interstate commerce, and the question ought to be finally determined by this Court.

2. The decision of the court below in the instant case and the decisions of the Eighth Circuit Court of Appeals in *Central Warehouse Co.* v. *Chicago, R. I. & P. Ry. Co.* 1927), 20 Fed. (2d) 828, and *F. Burkart Manufacturing Co.* v. *Fort Worth and D. C. Ry. Co* (1945), 149 Fed. (2d) 909 are directly in conflict with the decision of the Sixth

(2) In the cases of *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Alvin J. Fink* (1919), 250 U. S. 577, 63 L. Ed. 1151, and *New York Central & Hudson River Railroad Company* v. *York & Whitney Company* (1921), 256 U. S. 406, 65 L. Ed. 1016, this Court decided that a consignee who had contracted with the carrier to pay shipping charges and did in fact pay the charges demanded at delivery, but who, through a mistake on the part of the carrier, paid less than the published tariff rate, was liable for the difference between the amount collected at delivery and the correct amount calculated on the basis of the published tariffs, and no change of position by the consignee subsequent to the delivery of the goods and the original payment could estop the carrier from collecting the full tariff charges. In both cases this Court stated that the basis of the consignee's liability was his assumption of (the liability for) such charges.

In the case of *Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company* (1924), 265 U. S. 59, 68 L. Ed. 900, this Court held that a shipper was not liable for an undercharge in freight on an interstate shipment where the shipper had not, in fact, contracted to pay shipping charges, and the consignee not only had agreed to pay the same but did in fact pay the amount demanded at delivery although, through a mistake on the part of the carrier, this amount was less than was properly payable under the published tariffs.

Circuit Court of Appeals in the case of *Davis* v. *Akron Feed & Milling Co.*, 296 Fed. 675.(3)

3. The decision of the court below in the instant case is in conflict with the reasoning of this Court's decision in *Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company (supra)*. In the interest of the public and because of the importance of the question in the administration of federal laws relating to interstate commerce, it is believed that this Court ought finally determine whether the principles established by it in the *Central Iron* case *(supra)* control in determining the liability of a consignee for freight charges, or whether those principles are limited in their application to actions involving consignors.(4)

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(3) The court below and the Eighth Circuit construe the *Fink* and *York & Whitney* cases (*supra*), as imposing an absolute liability for freight charges by virtue of and solely because of the consignee's acceptance of the shipment, ignoring that in both decisions by this Court the basis of the consignee's liability was the latter's contractual undertaking (assumption) to pay freight charges, *plus* the acceptance of the shipment, *i. e.*, the consideration received for the executed promise to pay freight. In the Eighth Circuit cases the issue as to whether or not the consignee had contracted with the carrier to pay the charges sued for, was not raised by counsel or passed upon by the court. The actions were defended on the plea of estoppel, based on the equities involved. If liability exists, of course, estoppel is no defense. However, in the case of *Davis* v. *Akron Feed & Milling Co.*, 296 Fed. 675, the Sixth Circuit held that estoppel was a good defense to liability on the facts there presented. It is believed that the Sixth Circuit decision is correct in its result but wrong in its reasoning. The rule of decision ought to have been that the defendant did not contract to pay the shipping charges there sued for.

(4) In the *Central Iron* case (*supra*), this Court laid down these tests determinative of a consignor's liability for freight charges on an interstate shipment: (a) Did the shipper expressly or impliedly contract with the carrier to pay freight charges? If not, then he is not primarily liable for the same. (b) Did the other party to the shipping contract (in that case the consignee) assume the payment of freight charges? If so, then under the *Fink* decision he assumed payment of the full legal charges and the shipper is not secondarily liable. (c) In every case tests (a) and (b) are questions of fact to be determined by the trial court.

In the instant case the court below held that the only question presented in an action against a consignee to collect an undercharge of freight contracted for by the consignor is: Did the consignee accept the shipment? If the shipment is accepted, said the court, liability of the consignee for the full amount of freight charges due and payable under the statute, is automatically fixed as a matter of law. It also held that the principles of the *Central Iron* case (*supra*) were limited in their application to actions involving the liability of a consignor, yet nothing in the statute involved or the public policy established thereby, requires or even suggests this limitation.

4. Clearly the question presented by the decision of the court below is of public importance ([5]) in the administration of the federal laws relating to interstate commerce, not only for the reasons set forth in paragraphs 1, 2 and 3 *(supra)*, but also because:

a. The rule of decision of the court below in the instant case burdens interstate commerce and those receiving goods in such commerce, by making a consignee of such goods, despite his most forthright and careful efforts to avoid it, a surety against the solvency of the shipper, or the mistake or fraud of the shipper or carrier or both.

b. The rule of decision of the court below in the instant case permits a carrier, capriciously or by connivance, to flout and pervert the intent of Congress and its plain mandate in the statute referred to, by enabling the carrier to recover from a consignee who accepts the shipment, the amount of an undercharge which the latter did not create, had no knowledge of, never contracted to pay and from which it benefited in no way, instead of collecting the same from its customer, the shipper, who contracted for and is able to pay the same; thus granting to a favored, careless or dishonest shipper, a privilege or facility in the transportation of property not specified in the filed tariffs, the granting of which is expressly prohibited by the statute in question.

([5]) In 1946 (the latest year for which statistics are available) Class I railroads had car loadings (excluding less than carload shipments) totaling 25,876,880 cars. The total freight tonnage carried by such railroads for the same year was 1,060,489,345 tons in carload shipments and 15,792,705 in less than carload lots. Source: *Freight Commodity Statistics—Class I Steam Railroads in the United States, 1947 Statement 48,100, Interstate Commerce Commission.*

The total national revenue from freight transportation for the year 1946 amounted to $4,820,753,042 on carload lots and $365,669,160 on less than carload lots. Source: Study by the Bureau of Transport, Economics and Statistics entitled *"Freight Revenue and Value of Commodities, 1946, Interstate Commerce Commission"*.

5. The decision of the court below is believed to be erroneous and in conflict with the reasoning of this Court in the case of *Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company (supra)*, which sets forth the applicable standards for determining a consignor's liability for freight charges. It is believed that the same principles ought to control in determining the liability of a consignee and that by the application of those standards to the instant case, the decision of the court below is erroneous.([6])

It is further believed to be erroneous in that the court below considered the instant case within and disposed of by this Court's decision in the case of *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Alvin J. Fink (supra)* whereas, that case involved an entirely different issue than the one presented in this case.([7])

([6]) See Note (4). In the instant case the trial court found as a fact that the consignee did not contract with the carrier to pay freight charges. In addition, the record establishes that the other party to the consignment, *viz.*, the shipper, did contract with the carrier to pay shipping charges and was liable for the full amount thereof despite the signing of the non-recourse clause on the bill of lading. Cf. *Thompson* v. *Temple Cotton Oil Co.* (D. C. W. D. Ark., 1943), 54 Fed. Supp. 135, *Thompson* v. *Texarkana Cotton Oil Corp.* (D. C. W. D. Ark., 1943), 54 Fed. Supp. 212, *Chicago, B. & Q. R. Co.* v. *E. Bernier & Sons* (D. C. Minn., 1944), 56 Fed. Supp. 691 (694); See also *M'Ferran* v. *Taylor*, 3 Cranch. 270, 2 L. Ed. 436; *Cooper* v. *Schlesinger*, 111 U. S. 148, 28 L. Ed. 382; *Moore* v. *Crawford*, 130 U. S. 122, 32 L. Ed. 878. Barring the transposition of the parties to the consignment, the instant case is identical on its facts with those in the *Central Iron* case and petitioner believes that the failure of the court below to determine its liability by the application of the principles stated in the *Central Iron* case was error.

([7]) See Note (2). In both the *Fink* and *York & Whitney* cases (*supra*), the consignee contracted with the carrier to pay and did pay shipping charges but through mistake paid less than the posted tariff rate required. As pointed out in Note (2) above, it was the *assumption* by the consignee of the obligation to pay freight charges, plus the receipt of the shipment thereunder, which established the consignee's liability. In failing to recognize that the absence of contractual undertaking on the part of the petitioner here, removed the instant case from the realm of application of the principles announced by this Court in the *Fink* and *York & Whitney* cases (*supra*), the court below committed error. Similarly, the court erred in failing to recognize that when this Court, speaking through Mr. Justice Brandeis in the *Central Iron* case (*supra*), said (265 U. S. at p. 70), that "Under the rule of the *Fink* case, if

The absence of any undertaking or assumption on the part of the petitioner to pay shipping charges, plus the unquestioned liability of the shipper for the undercharge, plus the fact that the petitioner in no way, directly or indirectly, contributed to, participated in, had knowledge of or benefited by the undercharge, were the only issues raised by the petitioner and are the sole bases on which it denied liability in the court below (R. 3-5 and Appendix "E", *infra*, page 32).

The court below devotes much space in its opinion to setting forth why the principle of estoppel cannot be applied to the carrier in the instant case (R. 13-15), but the defense of estoppel was not raised by petitioner and has no bearing on the issue presented (See Appendix "E", *infra*, page 32). Obviously once the liability to pay shipping charges is created, neither estoppel nor contract can limit or defeat the liability, but the injection of the question of estoppel merely confuses the issue, it does not decide it. The issue involved in this case is not whether, liability existing, the carrier is estopped to enforce it. The issue is rather that no such liability was ever created. Estoppel is an affirmative defense to an existing obligation. The defense here is the general issue.(8)

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a shipment is accepted the consignee becomes liable as a matter of law for the full amount of freight charges, whether they are demanded at the time of delivery, or not until later * * * this Court had reference to a consignee situated as the consignee was in both the *Fink* and the *Central Iron* cases (*supra*), *i. e.*, a consignee who had expressly or by his conduct, impliedly, contracted with the carrier to pay freight. The defense in the instant case is not that petitioner did not contract to pay any greater charges than were paid by the consignor or were demanded before delivery. Rather the defense is that petitioner never contracted with the carrier to pay any part of the shipping charges.

(8) Cf. *Stone* v. *Bank of Commerce*, 174 U. S. 412, 43 L. Ed. 1028; *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. Ed. 1461, *Gilmer* v. *Poindexter*, 10 How. 257, 13 L. Ed. 411 and *Philadelphia, W. & B. R. Co.* v. *Howard*, 13 How. 307, 14 L. Ed. 157. Presumably, because of the inequities usually present in cases

So also, the court below discusses at length the "discriminatory preferences" (R. 13, 14) and "the involuntary rebates" (R. 16) which the statute (admittedly) condemns, and which, if the trial court's judgment were affirmed (implies the court below) the petitioner would receive, yet nowhere in its opinion does the court below state or define what preference or rebate it believes petitioner did receive. The record discloses none and confirms that the petitioner received none. Petitioner had a firm contract for the purchase of the goods shipped, before they were delivered to the carrier (R. 3, par. 5). What amount of freight charges the shipper paid was immaterial to petitioner because by the latter's contract, shipping charges were to be prepaid by the shipper (R. 3, par. 6). Petitioner paid the shipper exactly to the penny the same amount it would

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of this type, all of the lower federal court decisions, with one exception, cf. *Cincinnati Northern R. Co.* v. *Beveridge* (D. C., Va., 1925), 8 Fed. (2d) 372, and all of the state court decisions involving factual situations similar to the present case, turn on the issue of estoppel. Uniformly they assume the rule to be deduced from this Court's decisions in the *Fink* and *York & Whitney* cases (*supra*), to be that acceptance of the goods imposes an absolute liability for freight charges, ignoring, as mentioned in Note (2) above, that it was the contractual undertaking of the consignee in those cases plus the acceptance of the goods which fixed liability. In some of the cases at least, it would seem that the consignee did not contract with the carrier to pay the freight charges sued for, but that issue was not raised by counsel nor passed upon by the court. Even in the Sixth Circuit case of *Davis* v. *Akron Feed & Milling Co.* (*supra*), where the court found for the consignee, it based its decision on the "estoppel" of the carrier to recover. In that case a consignee contracted with a shipper in Chicago for goods there located, to be shipped F.O.B. Akron, freight prepaid by the shipper. Upon arrival the carrier represented that shipping charges, if any, prior to the arrival of the goods in Chicago, had been paid, and that the only charges due were those from Chicago to Akron which the consignee paid, and took delivery. Subsequently it was discovered that there remained unpaid shipping charges on the goods from Kansas City to Chicago, and the carrier sued to recover. It is submitted that a sounder rule of decision would have been that the consignee never contracted with the carrier to pay the charges sued for; that in the light of all the facts it could have intended only to contract for transportation from the point of origin under its contract of sale, to the point of destination, and that contract it discharged. Parenthetically, it should be stated that if the test of liability established by the decision of the court below be sound, then the consignee in the *Davis* case ought to have been held liable for the charges sued for.

have paid if the goods had been correctly described and the proper charges had been paid by the shipper (R. 4, par. 12 and R. 5, par. 18). To say, as the court below said in effect, in the instant case, that to permit recovery of shipping charges by the carrier from the petitioner on the basis of the record in the case, is merely a recapture by the carrier of an "involuntary rebate" obtained by the consignee, is to distort and confuse the plain words and the meaning of the statute. The consignee here, by virtue of its contract with the shipper, had a freight rate of zero to begin with. The only rebate it could have received would have to have been a bonus from the carrier for taking the goods. Obviously there was none.

The decision of the court below is further believed to be erroneous in holding that this Court's decision in the case of *Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company (supra)* is limited in its application to situations involving the liability of a consignor for freight charges (R. S. 18). ([9])

Petitioner further believes the decision of the court below to be erroneous in that the effect of it is to burden instead of promote interstate commerce, because under it a consignee who accepts a shipment cannot, in any way prior to or at acceptance of the shipment, protect itself against

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([9]) See Note (4). The language of the statute suggests no such distinction. On the contrary, the language of the statute indicates that it was rebates or remissions, of whatever nature, by a carrier to a shipper, at which the statute was specifically and principally aimed for it provides: "nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to *any shipper* or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." Yet the decision of the court below permits and approves the carrier's granting to a shipper who contracted to pay the full lawful rate, the preferential benefit specifically prohibited.

the mistake, the fraud or even the solvency of the shipper or the carrier or both, and in that it permits a carrier, by caprice or by design, to violate the express provisions of the statute on which its right to sue purports to rest, by giving a shipper the very sort of preference the statute condemns, leaving it to the consignee to collect as best he can, an unjust exaction imposed upon him under the guise of public policy.([10])

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROY C. COLLINS,
Counsel for Petitioner.

Dated: February 13, 1951.

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(10) This is nowhere more graphically illustrated than in the case at hand. The shipper is liable for the full legal charges calculated under the filed tariffs. The undercharge resulted from acts or omissions by the shipper, the carrier or both. The consignee did not contract with either the shipper or the carrier to pay freight charges. It made its position known to the carrier before it accepted delivery. It had no knowledge of, did not participate in, or benefit by the undercharge. Yet, said the court below, the consignee must pay because the carrier so elects; public policy requires it. Thus, the shipper is left free to enjoy the prohibited preference unless and until the consignee elects to travel 3,000 miles from home in an attempt to secure, by deposition or the transportation of witnesses, a judgment it may never collect. Certainly, such a fantastic result was never intended by Congress or by this Court.

Appendix "A".

49 United States Code, Section 6(7).

(Act February 4, 1887, c. 104, Sec. 6, par. 4, 24 Stat. 381, as amended Act March 2, 1889, c. 382, Sec. 1, pars. 4, 7, 25 Stat. 856, 857, Act June 29, 1906, c. 3591, Sec. 2, Sec. 6, par. 6, 34 Stat. 587, Act February 28, 1920, c. 91, Sec. 411, Sec. 6, par. 6, 41 Stat. 483).

"Sec. 6, par. (7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Appendix "B".

Excerpt from the Constitution of New Jersey of 1947.

(N. J. S. A. Const. Art. VI., Sec. 2, Par. 2).

* * * *

ARTICLE VI.
Judicial.

* * * *

Section II.

1. * * *

2. The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution.

Appendix "C".

Excerpt from New Jersey Statute Dealing with Practice and Procedure in the County District Courts.
(N. J. S. A. 2:30-10.6).

"The defendant in any civil action in a district court may defend by entering his appearance before the clerk of the court or filing an answer with said clerk within ten days after service upon him of the summons and complaint. If the defendant files a written answer, a copy of such answer shall be served upon the plaintiff, or plaintiff's attorney, if any, within the time required for the filing of the answer. Any such appearance, filing and service may be made by mail. (Laws of 1948, c. 385, p. 1570, Section 6.)

Appendix "D".

Brief Filed with Court Below, by Respondent, Southern Pacific Company.

Superior Court of New Jersey

APPELLATE DIVISION.

DOCKET NO. A-404-49.

SOUTHERN PACIFIC COMPANY,
Plaintiff-Appellant,

vs.

WHEATON BRASS WORKS, a corporation of the State of New Jersey,
Defendant-Respondent.

Civil Action.
On Appeal from Essex County District Court.
Sat below: Lyons, *J.*

BRIEF FOR APPELLANT.

RICHARD F. GREEN,
Attorney for and of Counsel with Appellant,
7 West Grand Street,
Elizabeth 4, New Jersey.

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Statement of Question Involved.

Whether a common carrier may under the Interstate Commerce Act, recover from the consignee the balance of freight charges on an interstate shipment where the consignor misdescribed the goods in the bill of lading and accordingly prepaid the freight at a rate lower than that provided in the filed tariffs for the goods actually shipped, the consignee having refused to accept the shipment until assured that the freight was prepaid, and having changed his position in reliance on such representation.

Statement of the Case.

The case was submitted to the Judge of the Essex County District Court on a stipulation of fact, which stipulation is incorporated in the Agreed Statement in Lieu of Record, 1a, *et seq.*

The plaintiff respectfully submits that the judgment of the Essex County District Court in favor of the defendant should be reversed for the following reasons:

1. A consignee who accepts delivery of an interstate shipment becomes liable as a matter of law for the full amount of the filed and posted tariff charges.

2. Consignee's liability depends upon public policy as expressed in mandatory legislation (U. S. Code, Title 49, Sec. 6(7)) which forbids preferences "in any manner or by any device".

3. No estoppel can prevent plaintiff's recovery, for plaintiff is obligated to collect as trustee for the public.

I.

A consignee who accepts delivery of an interstate shipment becomes liable as a matter of law for the full amount of the filed and posted tariff charges.

The consignee's liability attaches as a matter of law on his acceptance of delivery, regardless of his agreement to the contrary with the carrier, or with the consignor.

> *Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co.* v. *Fink* (1919), 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151;
>
> *Chicago & Northwestern Ry. Co.* v. *J. I. Case Plow Works* (1921), 173 Wis. 237, 180 N. W. 846.

This result follows from the terms of the bill of lading itself; Section 7 of the "Contract Terms and Conditions", which appears on the reverse of the bill of lading, provides:

> "The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; * * * The consignor shall be liable for the freight and all other lawful charges except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges." (The proviso which follows relates to shipments diverted and re-consigned en route, and has no application here).
>
> * * * * * * *
>
> "If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

The consignor is, at most, equally liable with the consignee, but since the non-recourse clause on the face of the bill of lading was executed in the instant case, the consignor has a good defense, and the plaintiff, since it is under a duty to collect from someone, must collect from the consignee, the defendant in this cause.

While there is some difference of opinion in the earlier Federal cases, the New Jersey decisions since 1917 all hold that the consignee is liable on the facts of the present case:

> *West Jersey & Sea Shore R. Co.* v. *Lake & Risley Co.* (N. J. Sup. Ct., 1929), N. O. R. 145 Atl. 336;
> *Atlantic City Railroad Co.* v. *Packman* (Sup. Ct., 1929), 147 Atl. 635, 7 N. J. Misc. 945;
> *N. Y. Central R. R. Co.* v. *Stanziale* (E. & A., 1929), 105 N. J. L. 593.

II.

Consignee's liability depends upon public policy as expressed in mandatory legislation which forbids preferences "in any manner or by any device."

> "This may be in the present as well as some other cases a hardship upon the consignee, due to the fact that he paid all that was demanded when the freight was delivered; but instances of individual hardship cannot change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation."
>
> *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Fink, (supra).*

In the case of *Western & Atlantic Railroad Co.* v. *Underwood* (D. C., Ga., 1922), 281 Fed. 891, in which a consignee was held liable for additional freight charges, the court said (at page 893):

> "That the consignee cannot accept delivery without incurring liability for the carriers charges, known or unknown, supposed to be prepaid or otherwise, and no matter what the consignee's actual relation to the shipper is, appears a harsh rule, but is seemingly established by authority. If by the shipper's omission the consignee is thus made liable for a charge which as between him and the shipper should not be borne by him his recourse is on the shipper. The carrier is not bound by their private rights in the transaction, whether known or unknown to it, nor by any mistake or misrepresentation occurring, but under the law may look to the shipper as the original contactor to pay and to the person who was consignee accepts the goods and becomes by statute liable to discharge the lien thereon until the lawful charges are satisfied."

In the pending case there was, instead of an "omission" on the part of the shipper, an erroneous description of the merchandise. But there is no difference in principle: As between carrier and consignee the carrier must prevail.

To the same effect, and on all fours with the pending case except that the shipper was insolvent, is the case of *Chicago, Rock Island and Pacific Railway Co.* v. *Central Warehouse Co.*, (D. C., Minn., 1926), 14 Fed. (2d) 123, where the court held that the carrier must recover regardless of hardship on the consignee. Affirmed, (C. C. A. 8, 1927), 20 Fed. (2d) 828.

> "It might be conceded that the rule * * * is harsh and inequitable in some instances. However it seems to be well established that a consignee cannot accept an interstate shipment without becoming liable for the carrier's lawful charges, known or unknown, supposed to be paid or otherwise no matter what relation exists between the shipper and the consignee."
>
> *Norfolk & Western Ry. Co.* v. *Williamson Grocery Co.* (W. Va., 1927), 103 W. Va. 532; 138 S. E. 102, at 104.

Under a bill of lading which, like that in the pending case, provides that the owner or consignee shall pay the freight, and where there is doubt as to the liability of the shipper, the accepting consignee is as between himself and the carrier, primarily liable.

> *Louisville & Nashville R. Co.* v. *Central Iron & Coal Co.* (1924), 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900.

III.

No Estoppel can prevent plaintiff's recovery, for plaintiff is obligated to collect as a trustee for the public.

In *Great Northern Railway Co.* v. *Hyder* (D. C., Wash., 1922), 279 Fed. 783, the plaintiff carrier delivered and defendant consignee accepted delivery of goods, both under the mistaken belief that the charges has been prepaid. The issue framed by the defendant and accepted by the court was stated:

> "Can a consignee, who is not at any time the owner of the goods shipped, who has not agreed with either the shipper or the carrier that he will pay the freight, who accepts the goods upon the carrier's representation that the freight has been prepaid, be bound by such acceptance to pay the freight?"

The court decided in the affirmative, that the consignee is bound, and in denying a plea of estoppel held that the shipper, the carrier, and the consignee are all trustees for the public, against which no estoppel can operate because it, the public, had done nothing and had made no representation on which the defendant could have relied.

To the same effect:

> *Main Island Creek Coal Co.* v. *Chesapeake & Ohio Ry. Co.* (C. C. A. 6, 1928), 23 Fed. (2d) 248.

In *New York, New Haven and Hartford Railroad Co.* v. *Lord & Spencer* (Mass., 1931), 273 Mass. 583; 174 N. E. 179, a shipment from Mississippi to Indiana was diverted en route to New Jersey, and again re-consigned to Boston. Charges were "collect" but by the carrier's error the way bills showed prepayment. Defendant demanded and received specific confirmation that charges as far as New

Jersey had been paid; nevertheless, when the error was discovered and the carrier sued for the previous charges, the court allowed recovery. The court noted but refused to follow:

American Express Co. v. *Sweeney* (D. C., Mass., 1922), 283 Fed. 691;
Cincinnati Northern R. Co. v. *Beveridge* (D. C., Va., 1925), 8 Fed. (2d) 372;
Davis v. *Akron Feed & Milling Co.* (C. C. A. 6, 1924), 296 Fed. 675.

Estoppel will not avail an innocent consignee even when the misrepresentation as to prepayment is due to fraud and conspiracy between the shipper and the carrier's freight agent.

Fort Worth & Denver City Railway Co. v. *F. Burkart Manufacturing Co.* (D. C., Mo., 1944), 56 F. Supp. 159. Affirmed: (C. C. A. 8, 1945), 149 Fed. (2d) 909.

Conclusion.

The defendant, Wheaton Brass Works, was the consignee and owner of the goods shipped, and regardless of any equities it may have as against the shipper, it is liable to the carrier both by the terms of the bill of lading and as a matter of law, for the full amount of the lawful freight charges on the shipment.

It is respectfully submitted for the foregoing reasons that the judgment below should be reversed and judgment entered for the plaintiff.

Respectfully submitted,

RICHARD F. GREEN,
Attorney for Plaintiff.

Appendix "E".

Brief Filed with Court Below, by Petitioner, Wheaton Brass Works.

Superior Court of New Jersey

APPELLATE DIVISION.

DOCKET NO. A-404-49.

SOUTHERN PACIFIC COMPANY,
Plaintiff-Appellant,

vs.

WHEATON BRASS WORKS, a corporation of the State of New Jersey,
Defendant-Respondent.

Civil Action.
On Appeal from Essex County District Court.
Sat below: Lyons, J.

BRIEF FOR RESPONDENT.

ROY C. COLLINS,
Attorney for and of Counsel with Respondent,
24 Commerce Street,
Newark 2, New Jersey.

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Counter-statement of Question Involved.

Whether a common carrier may, under the Interstate Commerce Act, recover from a consignee the balance of freight on an interstate shipment when the consignor, who had contracted to pay all freight charges, misdescribed the goods in the bill of lading and accordingly prepaid the freight at a rate lower than that provided in the filed tariffs for the goods actually shipped, the consignee having refused to contract to pay any part of the freight charges before delivery or to accept the shipment until assured that the freight was prepaid in full, having changed its position in reliance on such representation, and the consignor being still solvent.

ARGUMENT FOR RESPONDENT.

The defendant respectfully submits that the judgment, in its favor, of the Essex County District Court, entered on a stipulation of facts (incorporated in the Agreed Statement in Lieu of Record, A1a, *et seq.)*, should be affirmed for the following reasons:

I.

The basis of a consignee's liability to a carrier of an interstate shipment must be a contract to pay the carrier's shipping charges, either express or implied by the acceptance of the shipment by the consignee with the bill of lading attached.

Acceptance of an offer may be indicated by acts as well as words and acceptance of a document implies assent to its terms.

> *Williston on Contracts*, Vol. 1, Sec. 90, page 252, and 90A, page 257.

The same principle is also stated in Sec. 70 of the *Restatement of the Law of Contracts* as adopted and promulgated by the American Law Institute.

The liability of a consignee for freight charges arises from a contract implied in fact from his acceptance of the goods where the shipping document provides that the consignee shall be liable for freight charges.

> *Williston on Contracts*, Vol. 1, Sec. 90BB, page 270.

The mere existence of the relationship of carrier and consignee is not enough to establish a liability of the latter

to pay freight charges. There must be an agreement by the consignee, express or implied, in order to create such a liability.

Central Railroad Company of N. J. vs. *MacCartney,* (N. J. Sup. Ct., 1902), 68 N. J. L. 165, 52 Atl. 575;

Pennsylvania Railroad Co. vs. *Townsend,* (E. & A., 1917), 90 N. J. L. 75, 100 Atl. 855.

Cf. *New York Central Railroad Co.* vs. *Stanziale,* (E. & A., 1929), 105 N. J. L. 593, 147 Atl. 457, where the court emphasizes that the basis of liability was the fact that the consignee had exercised dominion over the shipment by selling the goods and assigning the bill of lading prior to arrival.

In *Louisville and Nashville Railroad Co.* vs. *Central Iron and Coal Co.* (1924), 265 U. S. 59, 44 S. Ct., 441, 68 L. Ed. 900, Justice Brandeis, delivering the opinion of the court holding that notwithstanding the provisions of the Interstate Commerce Act the liability of a consignor was dependent upon contract, and sustaining a judgment in favor of the consignor because the trial court found that in fact the consignor had never contracted to pay shipping charges, said at page 65:

> "But delivery of goods to a carrier for shipment does not, under the Interstate Commerce Act, impose upon a shipper an absolute obligation to pay the freight charges. The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination. The carrier was at liberty to require prepayment of freight charges, or to permit that payment to be deferred until the goods reached the end of the transportation. * * * Where the payment is deferred, the contract may provide that the shipper agrees absolutely to pay the charges; or it may provide merely

> that he shall pay if the consignee does not pay the charges demanded upon delivery of the goods. Or the carrier may accept the goods for shipment solely on account of the consignee; and * * * may contract that only the latter shall be liable for the freight charges. Or both the shipper and the consignee may be made liable * * *. We must, therefore, determine what promise, if any, to pay freight charges, was, in fact, made by the Central Company."

There was no express agreement on the part of the consignee herein to pay freight charges. Obviously, no such contract can be implied when, in fact, the consignee herein informed the carrier, prior to the acceptance of the goods, that by its contract with the shipper the latter was to pay the shipping charges and that it would, under no circumstances, be liable for freight charges, and the carrier, notwithstanding, delivered the goods to the consignee.

If a consignor may refuse to contract to be liable for freight charges in connection with a shipment made by him, notwithstanding the principle of public policy involved, then certainly the consignee can do the same. And in any given case (to quote the language of Mr. Justice Brandeis) we must determine what promise, if any, to pay freight charges, was, in fact, made.

That is the essence of the consignee's defense here. It does not seek to avoid liability on the ground that it never contracted to pay more freight charges than those collected before delivery. Such a defense would be obviously foreclosed by the holding of *Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co.* v. *Fink* (1919), 250 U. S. 577, 63 L. Ed. 1154. The defense is not that its alleged contract with the carrier was not to pay any more than was demanded before delivery. Its defense is on the broad ground that it never contracted to pay any part of the freight charges, but on the contrary refused to do so or, in other words, refused to so contract before delivery of the goods.

II.

The true intent and effect of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 6 (7)) is (a) that the parties cannot contract to pay other than full regular rates, and (b) that once the contractual liability to pay shipping charges is created, it can only be discharged by payment of the full legal charges.

In *Louisville and Nashville R. Co.* vs. *Central Iron and Coal Co. (supra)*, at page 65, Justice Brandeis said:

> "The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the Statute of Limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

Cf. *Williston on Contracts*, Vol. 1, Sec. 90BB, page 270.

In the instant case the plaintiff alone had assumed an obligation to pay the charges. No act or omission of the carrier could estop or preclude it from enforcing payment of the full amount against plaintiff as "a person liable therefor."

The consignee herein was not a party to the contract between the consignor and the carrier, nor did it in any way ratify, confirm or adopt that contract. On the other hand, it unequivocably refused to accept liability for shipping charges or to accept delivery of the goods until assured that the freight was prepaid in full.

III.

Whether in any given case contractual liability of a consignee for shipping charges of an interstate shipment exists, or is created, is a question of fact.

In *Louisville and Nashville R. Co.* vs. *Central Iron and Coal Co. (supra)*, Justice Brandeis said, at pags 66:

> "The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination."

Again, at page 67 of his opinion, Justice Brandeis said:

> "We must, therefore, determine what promise, if any, to pay freight charges, was, in fact, made by the Central Company."

And, further, at page 67 of his opinion (after outlining the evidence which the court normally looks to, to determine whether or not a contract by the consignor to pay shipping charges may be inferred), Justice Brandeis said:

> "But this inference may be rebutted, as in the case of other contracts. It may be shown, by the bill of lading or otherwise * * * that the shipper should not assume any liability whatsoever therefor; * * *"

Again, at page 68, he said:

> "On these facts, the trial court was justified in finding that the Central Company did not assume the primary obligation to pay the freight charges."

See also:

Pennsylvania Railroad Co. vs. *Townsend, (supra);*
and
Central Railroad Company vs. *MacCartney, (supra).*

IV.

The finding of the court below (A7a) as a fact that no contract to pay shipping charges was entered into by the consignee, being confirmed by the stipulated facts, ought not be disturbed by this court.

In its opinion letter, the court below stated:

> "After a consideration of the facts and briefs of counsel, the court cannot find that the consignee herein, the defendant, either factually or legally is primarily or secondarily liable. * * * From the stipulated facts it is apparent that the consignee did not promise either expressly or by implication to pay these freight charges. As a matter of fact, it refused to pay them and inquired what the correct amount was before accepting the shipment." (A7a-12, *et seq.)*

See also the Stipulation of Facts (A3a, *et seq.)* and, particularly, paragraph 10 thereof.

Where there was sufficient evidence before a trial judge, sitting as a court and jury in the district court, to support the judgment, the findings of fact will not be disturbed.

> *DeMoors* vs. *Atlantic Casualty Insurance Co.*, App. Div. (1948), 1 N. J. Super. 1, 61 Atl. 2nd 511.

See also:

> *State* vs. *Richardson,* App. Div. (1949), 4 N. J. Super. 503, 67 Atl. 2nd 885;
> *Serifin* vs. *Wolff,* App. Div. (1949), 5 N. J. Super. 386, 69 Atl. 2nd 347.

V.

The refusal of the consignee to contract for the freight charges did not defeat the public policy expressed in the Interstate Commerce Act because the consignor was still liable for the correct shipping charges notwithstanding the non-recourse clause in the bill of lading.

Where an undercharge results from the consignor's misdescription of the property, he is liable for the payment of the resulting undercharge, even though he has signed a non-recourse clause in the uniform bill of lading.

Thompson vs. *Temple Cotton Oil Co.*, 54 Fed. Supp. 135, D. C. W. D., Ark., 1943;
Thompson vs. *Texarkana Cotton Oil Corp.*, 54 Fed. Supp. 212, D. C. W. D., Ark., 1943;
Chicago, B. & Q. R. Co. vs. *E. Bernier & Sons*, 56 Fed. Supp. 691 (694), D. C. Minn., 1944.

VI.

The cases cited by plaintiff in support of its position have no application unless and until a contract to pay freight charges exists.

Every case cited by the plaintiff (except the *Central Iron* case, which was a suit against a consignor) involves situations where the consignee accepted the goods or exercised dominion over them. In no case does it appear that the consignee affirmatively took the position, before acceptance, that he would not accept the goods if there were

any freight charges payable, as is stipulated in this case (A4a, paragraph 10).

It is respectfully submitted for the foregoing reasons that the judgment below should be affirmed.

Respectfully submitted,

ROY C. COLLINS,
Attorney for Defendant.